Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-805

COMMUNITY CASH STORES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THOMAS G. GREAVES, III
THOMAS L. STEPHENSON
HAYNSWORTH, BALDWIN & MILES
P.O. Box 10005
Greenville, S.C. 29603
Attorneys for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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Petitioner, Community Cash Stores, Inc., by and through its counsel, Haynsworth, Baldwin and Miles, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on July 25, 1979. The Petition for Rehearing was denied on August 23, 1979. The decision of the Administrative Law Judge of the National Labor Relations Board (Board) was entered on May 19, 1978, and the order of the National Labor Relations Board was entered on September 22, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (No. 78-1675) is not yet officially reported. The opinion of the Board is reported at 238 NLRB No. 29, 99 LRRM 1256, 1978-9 CCH NLRB ¶ 15,049 (1978). These opinions are reprinted in the Appendix hereto at pp. 1a-41a.

JURISDICTION

The judgment of the court of appeals was entered July 25, 1979. Petitioner's Petition for Rehearing was denied on August 23, 1979. Petitioner's Motion to Stay Issuance of Mandate Pending Petition for Certiorari was denied on September 7, 1979. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Much of the Order of the Board was based on the finding that an employee of Petitioner, Leon Clowney, was an agent of Petitioner. Because of this finding, Clowney's acts and conduct in opposition to the Union, which would otherwise have been permissible, were attributed to Petitioner and held to be unlawful. The Court of Appeals for the Fourth Circuit affirmed the decision of the Board that employee Clowney was an agent of Petitioner. Thus, the question presented is:

> Did the National Labor Relations Board and the Court of Appeals for the Fourth Circuit apply an incorrect standard in deciding that employee Leon Clowney was an agent of the Petitioner, when it is clear upon the record that employee Clowney was merely an employee who engaged in these acts entirely of his own volition?

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act:

Section 2(2) [29 U.S.C. § 152(2)]

The term 'employer' includes any person acting as an agent of an employer, directly or indirectly....

Section 2(13) [29 U.S.C. § 152(13)]

In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 8(a)(1) [29 U.S.C. § 158(a)(1)]

It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.

Section 8(a)(3) [29 U.S.C. § 158(a)(3)]

It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

STATEMENT OF THE CASE

I. Jurisdiction Below

This case was before the Court of Appeals for the Fourth Circuit on a Petition for Review filed by Petitioner. The Petition sought review of an Order of the National Labor Relations Board which issued on September 22, 1978. The Court of Appeals for the Fourth Circuit possessed jurisdiction under Section 10(f) of the

National Labor Relations Act, 29 U.S.C. Section 151, *et seq.*, based upon the fact that Petitioner has offices and transacts business in the city of Spartanburg, South Carolina, within the jurisdiction of the Court of Appeals for the Fourth Circuit.

II. Background

Petitioner is a corporation engaged in the retail grocery business in North and South Carolina. A warehouse, located in Spartanburg, South Carolina, is the only facility involved in this case. Petitioner uses this warehouse to service retail grocery stores in and around the Spartanburg, South Carolina, area. Local 108, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (union) began an organizational drive at this facility on or about April 25, 1977.

Thereafter, the Company made various efforts to oppose the organizing effort. Some employees, of their own accord, also undertook to oppose the Union. An election was conducted by the Board on August 18, 1979, and Petitioner's employees voted 68 to 36 against union representation. The Union filed objections to the election with the Board and also charged that Petitioner had engaged in certain unfair labor practices. A hearing was held before Administrative Law Judge Robert Cohn to resolve both the charges and the objections. The Administrative Law Judge found that Petitioner had violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. The Judge ordered that the election be set aside and a new election conducted. The Board affirmed those findings. The Court of Appeals for the Fourth Circuit also affirmed the result but found it unnecessary to address the legal effect of a speech made by Petitioner's president during the campaign.

III. The Alleged Unfair Labor Practices

The Board found that numerous unfair labor practices were committed on behalf of Petitioner by employee Clowney. At trial, General Counsel for the Board attempted to establish that Clowney was a supervisor of the Petitioner. The Administrative Law Judge found that Clowney was not a supervisor (App., p. 21a). However, the Administrative Law Judge found that Petitioner's awareness of Clowney's antiunion activities constituted condonation and ratification, making Clowney Petitioner's agent despite the fact he was an hourly-paid employee (App., p. 22a).

The Board affirmed the Administrative Law Judge's decision as to the agency status of Clowney, but disagreed with the Administrative Law Judge's rationale. Specifically, the Board found that:

> Clowney had the apparent authority to act for Respondent in its antiunion campaign. The *critical issue* in making this determination *is whether under all the circumstances the employees would reasonably believe* that Clowney was reflecting company policy, and speaking and acting for management.

(App., p. 4a) (emphasis added)

In reaching this conclusion, the Board relied on various pieces of circumstantial evidence, none of which indicated that Clowney was Petitioner's agent. The Board noted that Clowney was an "older and more experienced" employee who was opposed to the union and who attempted to persuade other employees to vote against the Union (App., p. 4a). Nowhere in the record is there any evidence that Petitioner ever made any manifestation to the employees that would lead them to believe that Clowney was acting for or on behalf of Petitioner. The Board simply concluded that there was an "inference that

employees would reasonably believe Clowney was speaking and acting for management (App., pp. 7a-8a)."

Because of this alleged inference that employees would reasonably believe that Clowney was acting for Petitioner, numerous acts committed by Clowney were attributed to the Petitioner. Specifically, Clowney was found to have questioned employees about the union, solicited employees to withdraw union authorization cards, and engaged in other conduct which would have been permissible had it not been for the finding that Clowney was Petitioner's agent. The Court of Appeals merely affirmed the findings of the Board (App., p. 2a).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT

In 1947, the Taft-Hartley amendments to the National Labor Relations Act significantly altered the responsibility of employers for the acts of others. Before the amendments, employers were responsible for the acts of "any person acting *in the interest of* the employer." Wagner Act, ch. 372 § 2(2), 49 Stat. 450 (1935) (current version at 29 U.S.C. § 152(2) (1947)) (emphasis added). Presently, under the amended version, employers are responsible for the acts of "any person acting *as an agent* of an employer." 29 U.S.C. § 152(2) (1947) (emphasis added).

The purpose in holding employers chargeable only for the acts of their "agents" rather than for the acts of any person who acted in their interests was to limit an em-

ployer's responsibility to acts done within the actual or apparent scope of the acting person's authority.

> Under [the old language] the Board frequently 'imputed' to employers anything that anyone connected with an employer, no matter how remotely, said or did, notwithstanding that the employer had not authorized what was said or done, and in many cases even had prohibited it. By such rulings, the Board often was able to punish employers for things they did not do, did not authorize, and had tried to prevent.

See H.R.Rep. No. 245, 80th Cong., 1st Sess. 11 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 302 (1948).

Since the enactment of Taft-Hartley, the National Labor Relations Board has interpreted the law of agency in a manner which circumvents the effect of the statute as amended. Thus, in the instant case, the Board held that in deciding whether an employee had the apparent authority to act for the employer, "[t]he critical issue in making this determination is whether under all the circumstances the employees would reasonably believe" that the employee was acting for the employer (App., p. 4a). However, under the accepted common law of agency, this is not "the critical issue" in the determination of apparent authority. Apparent authority must be founded on something more than the belief of the people the alleged agent deals with. Liability can be imposed upon a principal only for the appearance of authority *created by the principal's* own acts. *Frank Sullivan Co. v. Midwest Sheet Metal Works*, 335 F.2d 33, 40 (8th Cir. 1964); *Restatement (Second) of Agency* § § 8, 27 (1957). The record below contains no evidence that Petitioner made any manifestation that employee Clowney had any authority

to speak for Petitioner in labor relations matters. Therefore, there is no legal basis for a conclusion that employee Clowney was Petitioner's agent. His acts in opposition to the Union were personal and not attributable to Petitioner.

Because the Board and many circuit courts continue to apply the law as it was written before the Taft-Hartley amendment, an important question is presented for this Court's decision. The Board, through a perversion of the law of agency, holds for all practical purposes that virtually any employee who openly acts in opposition to a union is an agent of the company. The courts of appeals have been inconsistent in their application of the law of agency to labor relations. This important area of uncertainty can only be settled by this Court's granting of the Petition for Certiorari in this case, and subsequently giving a precise explanation of the concept of apparent authority in the labor relations context.

II.

THERE IS NO CLEAR STANDARD AMONG THE CIRCUITS ON THE QUESTION OF WHEN AN EMPLOYER IS RESPONSIBLE FOR THE ACTS OF A NONSUPERVISORY EMPLOYEE.

There is no clear standard among the circuits as to when the conduct of an employee will be attributable to the employer. The varying tests used by the circuits are so vague and lacking in lucidity that there is in reality no legal standard on the subject. This Court should resolve this uncertainty.

A. The Second Circuit has held that acts by nonsupervisory employees can be imputed to the employer "if the employees in question have close ties with management, as where they customarily deliver to other employees

work instructions. . . ." *N.L.R.B. v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 941 (2d Cir. 1978), *cert. denied*, U.S. , 99 S.Ct. 188 (1978).

B. The Fifth Circuit has formulated the issue as, "the specific conduct at issue must be cloaked with the employer's authorization." *N.L.R.B. v. Big Three Industrial Gas and Equipment Co.*, 579 F.2d 304, 310 (5th Cir. 1978), *cert. denied*, U.S. , 99 S. Ct. 1501 (1978).

C. The Eighth Circuit would require that unless evidence is produced that employees "acted at the request or directive of management, the Company is not charged with responsibility for their actions during the election campaign." *N.L.R.B. v. Sayers Printing Co.*, 453 F.2d 810, 817 (8th Cir. 1971).

D. The Tenth Circuit appears to adhere to the same standard as that enunciated by the National Labor Relations Board. In *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 202 (10th Cir. 1967) the court held, "the crucial inquiry [is] whether the other employees had justifiable cause for believing that these supervisors were acting before and on behalf of management. . . ."

These decisions have thus created a great deal of uncertainty. The Board's position makes an employer responsible for the acts of an anti-union employee even when the employer does nothing to authorize such acts. This was exactly one evil that the Taft-Hartley amendments were designed to erase. These decisions also chill employees from exercising their legal right to oppose unionism. Employees thus must be apprehensive about engaging in the type of free and untrammeled discussion of unionism which they should be able to engage in. Employers are unjustly charged with the anti-union acts of employees. This Court should grant Certiorari in this

case, not only to finally resolve this dispute, but also to guide the courts and the Board in future cases. This Court should also set forth a clear legal standard so employers and employees can evaluate their actions in future cases.

III.

THIS IMPORTANT QUESTION WAS WRONGLY DECIDED BELOW.

The Court of Appeals for the Fourth Circuit did not even discuss the question that is presented by this case. The National Labor Relations Board incorrectly applied the law of agency by focusing on the subjective belief of the employees as to the agency status of employee Clowney rather than the question of objective manifestations, or lack thereof, by the employer.

Petitioner asserts that the decisions below in the instant case were based on an incorrect standard. The opinions below, both by the Board and the Court, should have found directives, instructions or other such manifestations by Petitioner that employee Clowney had the authority to act on its behalf before imputing those acts to Petitioner. The use of any other standard misconstrues the law of agency that should be applied in this case. Furthermore, it puts the employer in the position of having to accept the blame for acts it did not solicit or authorize.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be granted.

Respectfully submitted,

THOMAS G. GREAVES, III

THOMAS L. STEPHENSON

HAYNSWORTH, BALDWIN
& MILES

P.O. Box 10005
Greenville, South Carolina 29603
(803) 271-7410

November, 1979

APPENDIX

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 78-1675

COMMUNITY CASH STORES, INC.

Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

APPEAL FROM AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued June 8, 1979 Decided July 25, 1979

Before WINTER and PHILLIPS, Circuit Judges, and DUMBAULD,* Senior District Judge.

Thomas G. Greaves, III (J. Howard Daniel, Haynsworth, Baldwin and Miles on Brief) for Petitioner; Stephen

*Edward Dumbauld, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

Mayer, National Labor Relations Board (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Allison W. Brown, Jr., and Sandra Shands Elligers on brief) for Respondent.

PER CURIAM:

Finding that Community Cash Stores, Inc. (Community Stores) had committed violations of § § 8(a)(1) and (3) of the National Labor Relations Act by coercively interrogating employees about union activities, threatening employees with reprisals for their union support, soliciting withdrawal of union support, creating an impression of surveillance of employees' union activities and transferring certain employees to more onerous duties because of their union activities, the Board entered a remedial order. Community Stores petitions to set aside the order, and the Board to enforce it. The issue before us is the substantiality of the evidence in the record as a whole to support each of the violations found by the Board, except with respect to a speech made by the president of Community Stores to its employees. As to the speech, the issue is the legal one of whether what was undisputably said amounts to coercion under the Act.

From our examination of the record, we are satisfied that, viewed as a whole, there was substantial evidence to support the finding that § § 8(a)(1) and (3) were violated in the several regards as found by the Board, other than the speech. We find it thus unnecessary to address the legal effect of the speech, because the other unfair labor practices are sufficient to justify the Board's remedial order.

ENFORCEMENT GRANTED.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 11–CA–7089 and
11–RC–4351

COMMUNITY CASH STORES, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, LOCAL 108

DECISION, ORDER, AND DIRECTION
SECOND ELECTION

On May 19, 1978, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an exception.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has

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[1] The General Counsel's sole exception involved the Administrative Law Judge's inadvertent reference to employee Johnson in sec. I, C, 1, par. 1, of his Decision. It is clear from the context and the record that the employee in question is Williams. Accordingly, we sustain the General Counsel's exception.

We shall also correct an inadvertent error in the Administrative Law Judge's recommended Order.

decided to affirm the rulings, finding,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge concluded that employee Clowney acted as Respondent's agent based upon his finding that Respondent condoned and ratified Clowney's antiunion activities. Although we agree with the conclusion that Clowney acted as Respondent's agent, we do not adopt the Administrative Law Judge's rationale. Instead, we rely on the substantial evidence in the record indicating that Clowney had the apparent authority to act for Respondent in its antiunion campaign. The critical issue in making this determination is whether under all the circumstances the employees would reasonably believe that Clowney was reflecting company policy, and speaking and acting for management.[3] Respondent argues that Clowney acted independently. However, the following evidence demonstrates that Clowney worked in concert with Respondent and could reasonably be viewed by employees as its representative.

Clowney is one of Respondent's older and more experienced employees. During the representation campaign, he circulated among the employees, actively sought to

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent's request for oral argument is hereby denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] See *American Lumber Sales*, 229 NLRB 414, 420 (1975); *International Association of Machinists* v. *N.L.R.B.*, 311 U.S. 72 (1940).

persuade them to reject the Union, and attempted to get employees to sign statements repudiating their union cards.

Immediately after the speech given by Respondent's president on April 29, 1977,[4] to kick off its antiunion campaign, Clowney approached employee Williams, who at the time worked in Respondent's tobacco room. Clowney interrogated Williams, as he later did other employees,[5] about whether he had signed a union card. Clowney told Williams that he, Clowney, did not want Williams to get hurt and asked whether he wanted "to be like those loaders that they had in the back there."[6]

About 2 weeks before July 4, Clowney had another conversation with Williams concerning the Union. Clowney offered to withdraw his request to take his vacation around July 4, and thus allow Williams to take his vacation at that time,[7] if Williams would sign a statement withdrawing his union card. Williams refused and Clowney left the room. Within 20 minutes, Davis, Williams' supervisor, ordered Williams to unload potatoes

[4] All subsequent dates herein are in 1977.

[5] The Administrative Law Judge describes those incidents in full at sec. I, B, 2, of his Decision.

[6] Although the Administrative Law Judge struck that portion of Williams' testimony in which he stated what he thought Clowney meant by "back there," it is clear that Clowney was referring to those employees who unloaded trucks and railroad cars. Since Williams worked in the tobacco room, this reference to loading, a more arduous job than working in the tobacco room, was a veiled threat of a transfer to a less desirable position.

[7] Both Williams and Clowney had signed up to take their vacations around July 4. However, since company policy permits only one employee to be on vacation at a time and Clowney was senior to Williams, Williams could take July 4 off only if Clowney withdrew his request.

from the railroad cars. Williams was never returned to his former and more desirable position working in the tobacco room, although previously such assignments had always been temporary.

During the middle of May, Clowney spoke with another employee, Johnson, in the cafeteria at lunchtime. With Supervisor Dawkins present, Clowney told Johnson that he, Clowney, knew that Johnson had been organizing the employees, that the employees had held a union meeting, and that Johnson was a shop steward. Clowney added that as shop steward Johnson "can tell the boys on the platform out there to get off their ass."

Later, on June 22, just after Johnson had returned from the hospital and had been transferred from his forklift job to the more onerous task of unloading watermelons, Clowney told Johnson that the president had been good to Johnson and that Johnson ought to do "the right thing" about the Union. Six days later, Clowney became more specific and suggested that Johnson sign a statement repudiating his union membership. When Johnson refused, Clowney walked off stating that they had nothing more to talk about. It was more than 2 months after that exchange before Johnson was returned to his former and less arduous position of forklift driver.

The most revealing incident involved employee Cromer, who, unlike the others, eventually succumbed and signed a statement asking to withdraw his union card. In mid-May, Clowney interrogated Cromer about whether he had signed a union card. Although Cromer said no, Clowney came back a week later and told Cromer that if he had signed a card he had better start "doing something about it." That same day Clowney got Cromer to admit that he had signed a card. At that point Clowney said that Cromer should sign a statement with-

drawing his card. After Cromer agreed, Clowney left. Shortly thereafter, Clowney returned and told Cromer that Clowney would take him up to see Respondent's president about signing a statement to withdraw his union card. Cromer, however, declined the offer and said that he wanted to think about it some more. The next day Clowney unsuccessfully continued to pressure Cromer into signing a statement by telling him that he had to sign the statement within a half hour.

Cromer's supervisor, Davis, had a conversation with him 2 weeks later. Although Davis specifically said he was not going to ask Cromer whether he had signed a card, Davis warned Cromer that if he had signed a card he should "do something about it." After Cromer replied that maybe Davis was right, Davis left and said that he would check with Cromer again. Davis raised the subject a second time 3 days later. Cromer then said that he might as well go ahead and sign the statement. Davis responded that he had not seen anything yet and thus Cromer had not proven anything to him. When Cromer asked what was meant by that statement, Davis said that Cromer knew. At that point Cromer acquiesced and said that he would sign the statement. Davis then left and 15 minutes later an office employee, Joe Pike, approached Cromer and took him to an office where Supervisor Dawkins was present. Pike told Dawkins that Cromer was going to sign a statement and that Dawkins should assist Cromer. Dawkins told Cromer to go up to the meeting room where Clowney would join him. A few minutes later, Clowney entered the meeting room with a sample statement and some envelopes. Cromer signed the statement and gave it to Clowney. Soon afterwards, Cromer replaced Johnson as a forklift operator.

Contrary to Respondent's contention that Clowney acted alone, the above incidents fully support the inference that employees would reasonably believe that

Clowney was speaking and acting for management. Thus, Clowney clearly acted as Respondent's intermediary with respect to soliciting statements from employees repudiating the Union. He offered to take Cromer up to see Respondent's president, when Cromer indicated a willingness to sign such a statement. Respondent delegated to Clowney the responsibility of assisting Cromer in the statement's preparation, when Cromer eventually capitulated to Davis' pressure. In addition, the timing of the circumstances surrounding Clowney's activities suggests that, when Clowney attempted to persuade his fellow employees to repudiate the Union, he did so not as an individual employee but as a representative of Respondent. For example, Clowney warned Williams that he might end up like the loaders in the back. When Williams refused to sign a statement, he was transferred permanently to a job unloading railroad cars within 20 minutes of his refusal. Similarly, when Johnson rejected Clowney's entreaties, Johnson was kept in a job more onerous than his previous one as a forklift operator. However, when Cromer signed a statement he was given Johnson's forklift position. Finally, even Clowney's choice of tactic implicitly affiliated with him Respondent's antiunion effort. Clowney's representation that signing the form statement repudiating the Union was "doing something about it" was echoed by Supervisor Davis.

In summary, Clowney's activities focused on the solicitation of statements from prounion employees repudiating their union affiliation, conduct in which Respondent could not lawfully engage. He acted as Respondent's emissary with respect to procuring such statements. His solicitation campaign was implicitly adopted and supported by at least one of Respondent's supervisors. The circumstantial connection between Clowney's activities and Respondent's conduct in transferring

employees strongly suggests a concerted effort, especially where Clowney accurately predicted the consequences of a failure to repudiate the Union. Based on these factors and the record as a whole, we conclude that the employees would reasonably believe that Clowney reflected company policy, and spoke and acted for management. Accordingly, we find that Clowney had the apparent authority to act for Respondent.[8]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Community Cash Stores, Inc., Spartanburg, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. In paragraph 2(a) substitute the name "James McCollum" for that of "Paul Johnson."

2. Substitute the attached notice for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election held in Case 11–RC–4351 be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the

[8] In view of this finding, we also adopt the Administrative Law Judge's conclusion that Clowney's mid-May statements to Johnson created the impression of surveillance. We disagree with the Administrative Law Judge's rationale that the statements were unlawful because they were made in the presence of Supervisor Dawkins and rely instead on our finding herein that Clowney acted as Respondent's agent and thus Respondent is responsible for his conduct in the furtherance of the antiunion campaign. For the same reasons, we adopt the Administrative Law Judge's findings with respect to Clowney's other antiunion activities, including the imputation of Clowney's knowledge of the union activity of certain employees to Respondent.

Regional Director for Region 11 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 11 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[9] Those eligible shall

[9]In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

[footnote continued]

vote whether or not they desire to be represented for collective-bargaining purposes by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, Local 108.

Dated, Washington, D.C. September 22, 1978

John H. Fanning, Chairman

John A. Penello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 11–CA–7089 and
11–RC–4351

COMMUNITY CASH STORES, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, LOCAL 108

Paris Favors, Jr., Esq., and
Jasper C. Brown, Jr., Esq.,
for the General Counsel.

Thomas G. Greaves, III, Esq.
and J. Howard Daniel, Esq.
(*Haynsworth, Baldwin and Miles*),
Greenville, SC, for the Respondent.

Mr. Vernon Thomas, Glen Burnie, MD,
for the Charging Party.

DECISION

Statement of the Case

ROBERT COHN, Administrative Law Judge: This consolidated proceeding, held pursuant to Section 10(b) of the National Labor Relations Act, as amended (herein the Act), was heard at Spartanburg, South Carolina, on

December 14-16, 1977,[1] pursuant to due notice. The issues raised by the pleadings,[2] are, in essence, whether Community Cash Stores, Inc., (herein the Company or Respondent) interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act, and discriminated against five (5) of its employees in violation of Section 8(a)(3) of the Act, by acts and conduct of its agents and supervisors hereinafter detailed.[3]

Subsequent to the hearing, counsel for the General Counsel moved to amend the complaint to add as an additional allegation of violation of Section 8(a)(1) of the Act the disparate application and enforcement of a no-solicitation, no-distribution rule. (The original motion also alleged the general invalidity of said rule; however, such allegation was subsequently withdrawn.) The undersigned granted the motion by order dated February 2, 1978. Also within the time allowed, counsel for the General Counsel and counsel for the Respondent filed posthearing briefs, which have been duly considered.

Upon the entire record in the case, including my observation of the demeanor of the witnesses,[4] I make the following:

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[1] All dates hereinafter refer to the calendar year 1977, unless otherwise indicated.

[2] The original charge was filed June 29; the complaint issued August 16.

[3] The complaint case was consolidated with the representation case by Order dated August 30, wherein the Regional Director found that certain objections filed by Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 108 (herein the Union), to an NLRB election conducted on August 17 were coextensive with certain allegations in the complaint, and could best be resolved by a hearing.

[4] There are conflicts in the testimony of employees, former employees and supervisors of the Company respecting the issues in

[footnote continued]

FINDINGS AND CONCLUSIONS

I.

THE ALLEGED UNFAIR LABOR PRACTICES[5]

A. *The Union's Campaign and the Respondent's Response*

The Respondent is a corporation engaged in the retail grocery business through a chain of retail stores located in North and South Carolina; however, its warehouse located in Spartanburg, South Carolina, is the only facility involved in this proceeding. At such warehouse, where Respondent receives, stores, and ultimately ships to the retail stores items endemic to the modern day grocery store, are employed approximately 100 employees. Such employees are relatively unskilled and are principally engaged in the unloading, stocking and reloading of the

the case. In resolving such conflicts, I have considered, *inter alia*, inherent probabilities, the probabilities in light of other events, corroboration or lack of it, and consistencies or inconsistencies within the testimony of each witness and between the testimony of such witness and that of other witnesses with similar or apparent interests. In addition, where applicable, I have considered the fact that some persons testifying on behalf of the General Counsel were still employed by the Respondent against whom they testified. The Board has noted such factor as bearing on the credibility of a witness. (See *Georgia Rug Mill*, 131 NLRB 1304, 1305; *Astrosystems, Inc.*, 203 NLRB 49; *Federal Envelope Company*, 147 NLRB 1030, 1036.) My failure to detail each of the foregoing considerations, or other considerations which go into the assessment of demeanor, should not be construed as an oversight or omission. Cf. *Bishop and Malco, Inc.*, 159 NLRB 1159, 1161.

[5]There is no issue as to the Board's jurisdiction or the status of the Charging Union as a labor organization. The complaint alleges sufficient facts respecting direct inflow of goods into the State of South Carolina, which are admitted by answer, upon which I may, and do hereby, find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is also alleged, and admitted, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

merchandise manually or by means of mobile machinery such as forklift trucks. At all times material, the supervisory hierarchy of Respondent as relates to the warehouse was as follows: Broadus Littlejohn, Jr., president; Harold Ross, warehouse manager; Ernest Davis, receiving supervisor; Billy Wingo, shipping supervisor; "Red" Dawkins, warehouse supervisor; and Frank Lancaster, produce supervisor.[6]

On April 25, the Union filed a petition with the 11th Regional Office of the Board, seeking an election among the warehouse employees, such case being docketed as 11-RC-4351.[7] The following Friday, April 29, President Littlejohn convened all of the warehouse employees and made a speech to them, the transcript of which is included in the record herein.

Briefly stated, the speech may be characterized as one conveying strong antipathy toward the Union, with potential serious adverse consequences (both to the owners and the employees of the Company) arising should the Union campaign be successful. Thus, Littlejohn stated that the "matter [is] of serious concern for

[6]It is alleged in the complaint, and denied in the answer of the Respondent, that one Leon (Bunny) Clowney is a supervisor and agent of the Respondent in the so-called "Tobacco Room" of the warehouse. At the close of the hearing, I granted the Respondent's motion to dismiss that allegation insofar as it alleges that the said Clowney was a Section 2(11) supervisor, on the grounds that there was insubstantial evidence on the record to sustain that claim. However, for reasons discussed *infra*, I find that Clowney was an agent of the Respondent insofar as some of the illegal conduct attributed to him in the complaint is concerned.

[7]The election was subsequently held on August 17, and the Union lost by a vote of 68 to 36. Timely objections to the election were filed on August 24 by the Union, and by order dated August 30, the Regional Director for the 11th Region consolidated that case with the instant proceeding, for hearing.

me, for you, and for your families . . ."; that the 57-year old Company . . . "never had a Union. I do not want to have a union. I don't expect to have a union . . . [and] I and every member of Community Cash team intend to do everything the law allows us to do to fight this union; to keep it out of here." He then went on to remind the employees of the benefits which the Company had bestowed upon them in the past; of the close, personal relationship that always existed between the management and the employees, and of the fruits for the employees that grew out of such a relationship such as financial assistance from the Company when they needed it for emergencies. He mentioned that the "first thing they [the Union] will try to do is tear down this close relationship you and I have built and destroy it." In that connection, Littlejohn pointed out that if the Union were to become the exclusive bargaining representative it would mean that the employees "would no longer be able to come to me, or any other member of management with a problem relating to your job with Community Cash. Instead, you would have to take this problem to some union stranger, some outside union agent, or some shop steward, and let them handle it for you. . . ." Littlejohn closed the speech with the admonition: "I can truthfully say that I sincerely believe that getting mixed up with [the Union] will operate not to your benefit, but rather to your serious harm."

The speech is attacked in the complaint as one which contains language which "threatened employees with harm or other adverse consequences if said employees selected the Union as their collective-bargaining representative." I agree, particularly with respect to the following aspects: (1) the part wherein Littlejohn states that should the Union be designated as the exclusive representative, the employees "would no longer be able to come

to [him], or any other member of management with a problem relating to [his] job with Community Cash." The Board, noting that selection by employees of a Union does not, of course, preclude employees as individuals from going to their employer with their problems (citing Section 9(a) of the Act) has held that a similar "threat of denial of statutory right in reprisal for selection of a union" interferes with the employees' free choice in the selection of a bargaining representative, and constitutes interference, restraint and coercion within the meaning of Section 8(a)(1) of the Act.[8] (2) The "serious harm" aspect of the speech is strikingly similar to language in notices to employees which has occupied the attention of the Board and the Courts in many cases in the past.[9]

In *Greensboro*, the Board set forth its criteria for determining the legality of such notices, as follows:

> We have not ordinarily found such notices to be illegal in and of themselves, for the bare words, in the absence of conduct or other circumstances supplying a particular connotation, can be given a noncercive and nonthreatening meaning. Even the simultaneous existence of other unfair labor practices may not render the notice coercive, unless these practices tend to impart a coercive overtone to the notice. Where we have noted that other unfair labor practices have been found our decisions have been bottomed on the premise that there is a direct relationship between the notice and the total context

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[8]See *General Electric Wiring Devices, Inc.*, 182 NLRB 876; *Graber Manufacturing Co., Inc.*, 158 NLRB 244, 248-249; *Block-Southland Sportswear, Inc.*, 170 NLRB 936, 949.

[9]See, e.g., *Greensboro Hoisery Mills, Inc.*, 162 NLRB 1275, and cases cited therein; see also *Block-Southland Sportswear, Inc., supra*.

> in which it has appeared, including unfair labor practices, which serves to give a "sinister meaning" to what might otherwise be viewed as innocuous or ambiguous words. [footnote omitted]

In the most recent case which has been called to my attention regarding this point,[10] a three-member panel of the Board (one member dissenting,) refused to find a violation because the record there "failed to reveal any relationship between the letter (containing the "serious harm" statement) and any concurrent unfair labor practices."

The speech in the instant case is factually distinguishable from the letter in *Ohmite*. Although both reflected expressions of management's antipathy toward the unionization of its employees, the speech herein went to great lengths to point out the benefits which the employees enjoyed and which would obviously be placed in jeopardy should the employees select the Union. One of the benefits was the close relationship which the employees assertedly enjoyed, and which would be cut off by the placement of the Union in the warehouse.[11] Moreover, the recitation of such benefits coupled with the "serious harm" statement certainly raises a reasonable inference in the minds of the employees that the source of such benefits might well dry up if the employees acted contrary to the obvious desires of their employer.[12] Finally, as will be seen, the speech constituted only the opening volley of the Respondent's campaign to disabuse the employees

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[10] *Ohmite Manufacturing Company*, 217 NLRB 435 (1975).

[11] As previously noted, this aspect of the speech itself constituted an unfair labor practice.

[12] Cf. *Greensboro Hosiery Mills, Inc., supra*, citing the U.S. Supreme Court in *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405.

of the advantages of joining the Union, some of which conduct overstepped the bounds of legality. Thus the speech here was definitely related to other unfair labor practices committed by the Respondent's supervisors or agents, although the latter occurred subsequently to the speech, but prior to the election.

Based upon all of the foregoing, I find that the speech of President Littlejohn on April 29, in the particulars discussed above, constituted interference, restraint and coercion of employee rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.[13]

B. *Other Alleged Violations of Section 8(a)(1)*

The record reflects that during the months of May and June, the Respondent implemented the speech of Littlejohn by carrying on an antiunion campaign among the warehouse employees. Thus, supervisor Wingo admitted that he posted newspaper clippings on company bulletin boards which depicted strike violence and loss of jobs to employees due to strikes at other plants. He also carried some clippings around with him and showed them to individual employees. There was also posted on company bulletin boards the name and address of the union and of the National Labor Relations Board. This was significant in that company supervisors admittedly asked employees under their supervision whether the latter had read the bulletin boards and inquired whether the employees had any questions concerning the matters

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[13] Counsel for General Counsel presented only one witness, Larry Middleton, to testify respecting Littlejohn's speech. To the extent that Middleton's testimony is at variance from Littlejohn's, I credit the latter.

displayed thereon.[14] It is abundantly clear from the record that employee Leon (Bunny) Clowney was central to the antiunion campaign in the plant. As previously noted, Clowney was alleged in the complaint to be a supervisor. Although I dismissed this allegation at the close of the hearing upon Respondent's motion, based upon insubstantial evidence, I find, based upon the evidence set forth below that Respondent's supervisors and management were well aware of his activities, that they condoned and ratified such activities, and that therefore Clowney became an agent for the Respondent with respect thereto.[15]

1. Supervisory status of Leon (Bunny) Clowney

Clowney was an employee in the so-called "Tobacco Room" in the warehouse, which was under the supervision of Ernest Davis. There were approximately six (6) employees in the Tobacco Room, and Clowney was one of the older, more experienced, employees there. However, he performed the same manual work that the other employees performed such as stocking items, pulling orders, operating the stamp machine, sweeping the floors, etc. He punched the timeclock as did all other employees (admitted supervisors did not punch the timeclock), and was not the highest hourly paid employee in the Tobacco Room.[16] There is no evidence that Clowney had the power to hire, fire or discipline employees. Indeed, there

[14] It is apparent that the company was aware that its supervisors could not, under usual circumstances, legally interrogate employees concerning their union membership, or solicit employees to revoke their union membership cards. Accordingly, the record reflects that the company adopted the technique of placing antiunion materials on the bulletin boards and then asking employees whether the latter had any questions or comment concerning the matter.

[15] Cf. *Int'l Assn. of Machinists* v. *N.L.R.B.*, 311 U.S. 72 (1940).

[16] Marvin Sizemore was paid a higher hourly rate than Clowney.

was only one former employee of the company who testified that Clowney possessed or exercised any of the indicia of supervisory authority enumerated in Section 2(11) of the Act. Thus John Williams testified that when he was first hired, Clowney showed him what to do and how to do it, in the Tobacco Room. However, the record clearly shows that the work is of an unskilled nature, can be easily learned in a short time, and once learned the employees need no further instruction concerning the work; that they know what to do by virtue of a schedule posted daily in the Tobacco Room respecting the pulling of orders for the retail stores; further, that Davis who has only a total of 25 employees under his supervision, and regularly comes into the Tobacco Room several times a day to check on work performance. Former employee Williams testified that he overheard Clowney recommend the employment of one Reverend Brice, who was subsequently employed; however, there is also other evidence in the record that other employees made equally effective recommendations so that this is not particularly significant. Williams testified that on one occasion Clowney admonished him concerning a shipment which had been erroneously sent, but no discipline was imposed. Finally, he testified that he requested time off from work on one indefinite occasion which Clowney "o.k.'d"; however, there is no proof that Clowney exercised the use of independent judgment on this occasion.

In sum, as previously noted, there is simply a lack of substantial evidence that Clowney either possessed or exercised the authority over employees in the Tobacco Room required under Section 2(11) of the Act.[17]

[17] Clowney was not called as a witness at the hearing, and counsel for the General Counsel urged that I draw an adverse inference from Respondent's failure to call him (it was not shown that he was unavailable; indeed, he may have appeared in the courtroom

[footnote continued]

However, as previously noted, the record amply supports the contention of counsel for the General Counsel that Clowney's sympathies were against the union, and that he actively sought to persuade his fellow employees to reject the union and to seek return of any union cards which they may have signed. This testimony is undenied, and may be briefly set forth as follows:

2. Clowney's antiunion activities

a. John Williams testified that Clowney asked him if he had signed a union card, and stated that he would not tell anybody that Williams had signed a card. Subsequently, Clowney offered to let Williams have his vacation during the week of July 4 if Williams would sign a statement to get his union card back.[18]

b. In mid-May, employee Paul Johnson had a conversation with Clowney and supervisor "Red" Dawkins in the cafeteria. Clowney said, "I hear that you're getting this union started." When Johnson replied that he was unaware of what Clowney was talking about, Clowney stated, "I heard you all had a meeting Saturday." Johnson acknowledged that there was a meeting but it was the previous Saturday. Whereupon, Clowney said, "I heard that at the meeting you were voted in as a shop

for part of the proceeding). However, the Board has held that it was improper for an Administrative Law Judge to draw such an adverse inference where the person was an employee and equally available to all parties. See *Mangurian's Inc.*, 227 NLRB 113, fn. 2.

[18]This should not be construed as an indicia of supervisory authority. The record reflects that employees in the Tobacco Room signed a schedule for their vacation week, and that Williams desired the week of July 4. However, Clowney indicated to Williams that because of his seniority, he (Clowney) had preference, but that he would exchange times with Williams if the latter would sign the statement to get his union card back. Williams refused.

steward," but Johnson retorted "I don't know what you're talking about." Clowney responded, "You are a shop steward; you can tell the boys on the platform out there to get off of their ass."[19]

c. On or about June 22, Johnson had another conversation with Clowney in the warehouse wherein the latter recalled to Johnson the favors which President Littlejohn had done in the past for him, and suggested that when "this union thing comes up," Johnson respond by "doing the right thing."

d. On June 28, Johnson had another conversation with Clowney in the Tobacco Room wherein Clowney asked if Johnson liked the working conditions at the company. When Johnson answered affirmatively, Clowney requested that Johnson sign a paper to get his union card back. Johnson declined. Whereupon, Clowney reiterated, "Hasn't Dick Littlejohn always loaned you money and helped you?" When Johnson acknowledged that he had, Clowney said, "Why turn on him, why go against him?" Johnson responded that he thought what he (Johnson) had done was "right," but Clowney retorted, "Well, since you don't want to sign the paper to get the union card back we ain't got nothing to talk about."

e. In May, Clowney had several conversations with employee Donald Cromer in which he interrogated Cromer as to whether the latter had signed a union card.

[19]Neither supervisor Dawkins nor Clowney were called as witnesses at the hearing; under the circumstances, I believe it appropriate to draw an adverse inference from the Respondent's failure to call Dawkins as a witness, he being an admitted supervisor and it not appearing that he was unavailable to testify. Accordingly, I credit Johnson's testimony and find that the statements of Clowney, in the presence of an admitted supervisor, constituted an impression of surveillance of union activities, in violation of Section 8(a)(1) of the Act.

Although Cromer had in fact signed such a card, he did not admit it to Clowney. Clowney advised that if Cromer had had anything to do with the union or signed a card, he ought to do something about it because the union was no good for him. When Cromer finally admitted that he had signed a union card, Clowney advised that Cromer do something about it, and stated that he (Clowney) had a statement that Cromer could sign and "get his name cleared with the union." Initially, Cromer declined to sign such a statement, but after several solicitations by Clowney, he accompanied Clowney to a room adjacent to the Tobacco Room. However, when Clowney showed him the statement to be signed, Cromer changed his mind and left the office.

The next day Supervisor Davis approached Cromer and stated that he (Davis) did not intend to ask Cromer whether the latter signed a union card, but if he had done so, he should do something about it. Cromer responded that Davis might be "right about that." About 3 days later Davis returned to Cromer and Stated that Cromer had not proved anything to him; whereupon, Cromer replied that he would sign the statement. About 15 minutes later an office employee approached Cromer and the latter went with him to supervisor Dawkins who, in turn, told Cromer to go to "the meeting room, and that he (Dawkins) would get Bunny (Clowney) to come on up." Shortly thereafter, Clowney came in with a statement and two envelopes. The language of the statement indicated that Cromer wanted his card back from the union, and Cromer executed it. Thereafter, Clowney said that that is what he had been trying to get Cromer to do all of the time, and that "I was doing the right thing by writing that letter."[20]

[20]Credited testimony of Cromer. After Cromer had signed the statement and placed it in the envelope, Clowney advised Cromer to leave by the side door so that no one would see him.

It is apparent from the foregoing recitation that Respondent's supervisor Dawkins was well aware of Clowney's activities respecting solicitation of employees to revoke their union cards, and therefore the conduct of Clowney in this regard, which patently constituted interference with their Section 7 rights in violation of Section 8(a)(1), was attributable to the Respondent.

That "Red" Dawkins was not the only supervisor who was aware of, condoned and approved Clowney's conduct was confirmed by the testimony of supervisor Ernest Davis. Davis testified that he knew that Clowney was against the union, and that he was "going around talking to some of the employees about the union." Davis did not tell Clowney "that he wasn't supposed to be talking to people about the union during work time" even though there was a company rule against solicitation in the warehouse. This admission of Davis, considered with the credited testimony of Cromer, (that Davis pressured him into signing the statement and apparently sent an office employee to consummate the matter when Cromer indicated his acquiescence) further confirms, in my view, the conclusion that Respondent's supervisors, being aware that it was unlawful for them to solicit employees' signatures to revoke their union cards, utilized Clowney to accomplish their objective.

f. During April, Clowney had a conversation with employee James McCollum in which he advised that he (Clowney) knew McCollum's parents, that McCollum was a "good boy," but the union would not "do him any good." McCollum responded that "he was his own man."

g. In May, Clowney had a conversation with employee Allen Meadows in which Clowney advised Meadows to "stay away from the union." Clowney further suggested that if Meadows had a union card he should sign a statement to get it back. Meadows responded that he would "think about it."

h. In May, Clowney told employee David Scott that he (Clowney) did not like the union, and felt that it would hurt the employees. He also explained to Scott how the latter could get his union card back if he so desired—that he could sign a statement in the office to accomplish that.

i. In June, Clowney had a conversation with employee Lewis Rogers in which he stated, "Something is going to happen to all of you beefcutters, and wasn't [Rogers] sorry he signed a union card." Rogers' responded, "No, he was not sorry."

3. By Supervisors Wingo and Ross

In May and June, employee Abraham Jeter had conversations with supervisors Harold Ross and Billy Wingo concerning the union. According to Jeter, both Ross and Wingo asked him how he felt about the union, and he responded, "Whichever side wins, that's the side I am for." Both Ross and Wingo denied interrogating Jeter in the manner he testified, but admitted initiating the conversation by asking Jeter whether there were any questions he would like to ask concerning the union campaign. Jeter had no questions.

The credibility issue here has been exceedingly difficult; however, I am inclined to credit Wingo and Ross. In addition to all of the factors set forth *supra*, fn. 4, I am convinced that Respondent's supervisors were instructed that it was probably illegal for them to directly interrogate an employee concerning the latter's union activities but that they could properly ask the employee whether the latter had read the company bulletin board, and if he had any questions concerning the union campaign. The record is abundantly clear that the supervisors utilized this technique among the employees whom they

knew or were under their supervision. Accordingly, I shall recommend that the complaint be dismissed insofar as it alleges coercive interrogation on the part of Wingo and Ross.[21]

Employee Lewis Rogers testified that in June, supervisor Billy Wingo walked up to him on the loading platform and asked Rogers whether he had signed a union card. When Rogers replied afformatively, Wingo retorted that "He never had it so good." Wingo admitted talking to Rogers about the union several times, asking the latter whether he had checked the bulletin board and did he understand it. When Rogers acknowledged that he had read the material on the bulletin board, Wingo told him that if he ever had any questions, Wingo would try to answer them for him as best he could. For reasons expressed in the preceding paragraph, I credit Wingo and recommend dismissal of the complaint insofar as it alleges coercive interrogation by Wingo as to Rogers.

Wingo admitted having several conversations with employee David Scott. (Scott placed them in June). Wingo showed him some newspaper clippings which depicted other plants where union workers had lost their jobs. When Scott appeared unimpressed—stating that the material was propaganda—Wingo expressed his conviction that the Union would be detrimental to the workers—that there was a possibility that they would lose their jobs or that their hours would be cut.[22] I find such state-

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[21] I have also considered, in making this specific credibility resolution, the impairment of Jeter's credibility brought about by the contradiction between his testimony at the hearing and that in a prehearing affidavit.

[22] Credited testimony of Scott. The fact that this statement appeared only in his second pre-hearing affidavit and not in the first, does not override in my view, the truthful and candid manner in which he testified on the witness stand.

ment—particularly in the context of the newspaper clippings—to be threatening and coercive of employee rights, in violation of Section 8(a)(1) of the Act.

4. The no-solicitation rule

On or about April 29, the Company posted a solicitation rule which stated, in relevant part:

> Solicitation by employees on Company property during working time, which in any way interferes with work, is prohibited.

As previously noted, the undersigned granted a post-hearing motion by counsel for the General Counsel to allege that the Respondent violated Section 8(a)(1) of the Act by its disparate application of the foregoing rule. Such motion was based upon the testimony of Supervisor Ernest Davis, elicited on cross-examination, to the effect that Davis knew that Leon (Bunny) Clowney was against the Union; that he also knew that Clowney was "going around talking to fellows about the Union"; and that Davis did not prohibit or attempt to prohibit Clowney from engaging in such conduct. It may be reasonably inferred from all of the evidence in the record that Clowney engaged in such conduct, at least in part, during working time. However, it is my view that the General Counsel has not sustained his burden of proof on this issue because there is no evidence that the Respondent prohibited, or sought to prohibit, prounion employees from soliciting on behalf of the Union during working hours, or generally permitted solicitation for other purposes.[23] Although one may surmise that, in view of the Respondent's strong antipathy toward the union's organizational campaign, that there was a

[23] See *State Chemical Company*, 166 NLRB 455; cf. *Roney Plaza Apartments* 232 NLRB No. 66 (1977).

discriminatory purpose for the rule, suspicion is no substitute for evidence. Accordingly I find that there is insubstantial evidence on the record to support this allegation of the complaint, I shall therefore recommend that the complaint, to this extent, be dismissed.

C. *The Alleged Discrimination*

The complaint alleges that the Respondent, in May and June, discriminated against five (5) of its employees,[24] by assigning them to more difficult and onerous jobs, because of their union activities. The record reflects that the "more difficult and onerous jobs" referred to the unloading and handling of watermelons, potatoes or similar produce by hand. The Respondent, while admitting making the alleged assignments, denied that it was for a discriminatory reason. However, I find for the reasons discussed below that, with the exception of Abraham Jeter and Lewis Rogers, there is substantial evidence on the record to sustain the contention of the General Counsel.

As previously noted, the two supervisors of the warehouse who have employees regularly assigned to them on the day shift are Billy Wingo, supervisor of shipping, and Ernest Davis, supervisor of receiving.[25] Under normal conditions, an employee would work for the supervisor to whom he was assigned and perform essentially the same duties. For example, an employee assigned to the Tobacco Room under Davis would normally work every day performing his tasks in that location under Davis;

[24] John Williams, Paul Johnson, Abraham Jeter, James McCollum and Lewis J. Rogers.

[25] There is a night crew under the supervision of Frank Lancaster which receives and unloads produce arriving at the warehouse at night.

similarly, an employee operating a forklift truck on the shipping platform would normally work every day in that capacity under Wingo. However, as might be expected, on certain occasions work in one part of the warehouse might be slack while in another part, due to unusual shipments of merchandise, there would be a heavy demand. In these circumstances, Wingo and Davis would call upon each other for the use of an employee, or a number of employees, for assistance. These requests would customarily be granted and, as Wingo testified, ordinarily the employees would return to their respective supervisors once the temporary situation abated.

The record reflects that commencing in late May, and continuing into June and July, Respondent received a substantial number of watermelons which had to be unloaded manually from railroad cars. Such work was, in my judgment, clearly of a more onerous and arduous nature than, for example, operating a forklift machine or "pulling orders" of cigarettes or cosmetics in the Tobacco Room, or sweeping the floors of the warehouse. As previously noted, the five employees under consideration were, in May and June, reassigned from their normal duties to work unloading the watermelons and other produce, along with approximately a dozen other employees. Their individual circumstances may be briefly set forth as follows:

1. John Williams

Williams worked for the Company for about 2 years before he voluntarily quit in October. During this time, he had worked under the supervision of Ernest Davis, and was regularly assigned to the Tobacco Room. However, both Davis and Williams testified that during the latter's employment he was sporadically assigned to other jobs

including "working on the railroad," i.e., manually unloading produce or other items from railroad cars. Johnson testified that he was active in the organizational campaign in the spring of 1977; that he attended some 18 union meetings and solicited other employees to join the Union. Subsequent to Littlejohn's speech on April 29, he had two conversations with Clowney concerning the Union, above set forth, the latter conversation being concerned with Clowney's offer to exchange places on the vacation sheet with Johnson if the latter would sign a statement to get his union card back. Johnson refused. It was, according to Johnson's testimony, immediately following that conversation that Davis assigned him from the Tobacco Room to working on the railroad. Most significantly, he remained there until he voluntarily left Respondent's employment in October.

I find the assignment by Davis to be discriminatorily motivated, based principally upon (1) the timing of the assignment (shortly after Williams' refusal to acquiesce in Clowney's proposition) and (2) the fact that, contrary to prior practice, Williams was not reassigned to his regular work in the Tobacco Room following the temporary assignment of unloading watermelons. Contrary to the contentions of the Respondent, the Respondent was clearly aware of Williams' sympathies toward the Union as indicated by the conversations with Clowney, an agent of Respondent. The fact that Williams had previously performed manual labor on the railroad is beside the point because, as previously noted, such work was assigned on a sporadic basis and Williams was always returned to his job in the Tobacco Room. Finally, the fact that other employees whose union sympathies were not shown to be known to the Respondent (including one employee who acted as Respondent's observer at the election) were assigned to the railroad at about this time

does not negate the conclusion that the Respondent discriminated against some of its prounion employees.[26]

2. Paul Johnson

Johnson worked under Supervisor Wingo for about 5 years prior to the alleged discrimination in June. For the period immediately preceding his assignment to the railroad, he worked as a forklift operator. In June, Johnson was hospitalized for a period of time, and when he returned to work he found that his forklift job had been assigned to another employee, Donald Cromer, and Wingo directed Johnson to "go with Ernest Davis." Davis assigned him to unloading watermelons by hand. When Johnson complained to Davis that he had just been discharged from the hospital and the work was hurting his back, Davis was unimpressed, and Johnson continued working in that capacity for 2 weeks. He was then returned to Wingo where he unloaded trucks by hand on

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[26]In its brief, Respondent cites *Dayton Tire & Rubber Company*, 216 NLRB 1003, 1007-1008, in support of its defense. Respondent claims that in the cited case, "the Board held that the assignment of two known union adherents to more difficult and onerous jobs was *not* unlawful, since there was a business reason for the transfer and since employees other than the alleged discriminatees were assigned to the same job." (Respondent's brief, at p. 22). However that case is factually distinguishable. There, due to an unusual situation in a warehouse, all but one of the warehousemen assigned to the rail dock (which included the two alleged discriminatees) unloaded boxcars for 2 consecutive days. Under these circumstances the Administrative Law Judge (affirmed by the Board) dismissed this allegation of the complaint even though the alleged discriminatees were the only warehousemen who wore prounion T-shirts. Here, as previously pointed out, the discrimination is based not only upon the timing of the assignment, but also upon the Respondent's failure, contrary to prior practice and without proffer of another reason, to reassign Williams to the Tobacco Room job.

the platform for a period of about 2 months before he was reassigned to driving the forklift truck.

Johnson's conversations with Clowney and Dawkins concerning the union have been previously set forth. It will be recalled that when Johnson refused to "sign the paper to get his union card back," Clowney replied, "Well, since you don't want to sign the paper to get the union card back we ain't got nothing else to talk about." Respondent contends that since Johnson's job on the forklift machine was taken by Cromer, a known union supporter, while Johnson was on medical leave, the assignment of Johnson could not be found to be discriminatorily motivated. However, there is a significant difference: Cromer acquiesced in Clowney's solicitation and signed the revocation statement; Johnson refused to do so.

I find, based upon all of the foregoing, that the assignment to Johnson to perform the arduous work of lifting watermelons immediately upon his release from the hospital; the continued assignment of such work after he complained to the Respondent about such back-breaking work; and the following assignment for approximately 2 months to unloading trucks by hand, constituted retribution by the Respondent for Johnson's failure to cooperate with it with respect to the union campaign. It therefore constituted discrimination to discourage union membership, in violation of Section 8(a)(3) of the Act.

3. Abraham Jeter

Prior to the alleged discriminatory assignment in June, Jeter worked under supervisor Wingo operating a forklift machine. It should be pointed out that Jeter has only one fully developed arm; the other arm is a stub. When hired, he told Wingo and Ross that he thought he could handle

"groceries," meaning cases of goods. During the period of his employment with the Company prior to June (he commenced working in September, 1976), Jeter spent most of his time operating material handling and hauling machines such as a "double jack" and a forklift truck. In the early part of June, Wingo assigned him to Davis who took him over to the watermelon truck. When Jeter expressed surprise at such assignment, Davis said, "You can do anything we've got to do in the warehouse."[27] Jeter worked 4 hours that morning attempting to load watermelons; however, when it became evident that he could not handle them he was returned to his job loading trucks and sweeping the warehouse.

In my view, there is insubstantial evidence to support the contention of the General Counsel with respect to Jeter. The only evidence of his union activities is that he attended union meetings and signed a card. There is no evidence that any of this was viewed by any management representative, and his conversations concerning the union with Ross and Wingo above described, do not reflect that either supervisor was made aware of Jeter's union sympathies. Accordingly, I find a lack of substantial evidence of Company knowledge upon which to base a finding of violation. Moreover, when it was evident that Jeter was unable to perform the assignment of unloading watermelons, he was reassigned to other work within 4 hours, work which was less onerous and which he and other warehousemen had regularly performed in the past. Under all circumstances, therefore, I shall recommend that the complaint be dismissed insofar as it alleges discriminatory conduct toward Abrham Jeter.

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[27] Testimony of Jeter.

4. James McCollum

Prior to the alleged discrimination on May 21, McCollum worked as a forklift driver under supervisor Wingo. In late April or early May McCollum had a conversation with Clowney in which the latter told him that the union would not "do him any good." McCollum responded that "he was his own man," and walked off. About 2 weeks later McCollum was assigned by Wingo to work for Ernest Davis. There, he was assigned to unloading trucks for about a week and then was assigned to the railroad performing manual labor. Prior to this assignment, he had never unloaded boxcars by hand during his employment with the Company. As far as the record shows, he was never transferred back to his former job operating the forklift truck, and was at the time of the hearing unloading railroad cars under supervisor Davis.

Neither Wingo nor Davis adequately explained, in my view, why McCollum was not returned to his former job as was customary. Wingo testified that Davis came to him one day and said he wanted a man, and Wingo sent him James McCollum because McCollum was apparently the first employee Wingo saw on the platform following Davis' request. Under all circumstances, including particularly the timing of the transfer following the Clowney–McCollum conversation in which the latter indicated a lack of cooperation with Clowney, I am convinced and therefore find that the assignment of McCollum to the more arduous and onerous job of unloading trucks and boxcars—to which he was permanently assigned—was motivated, at least in part, by McCollum's union activities and in order to discourage membership in the union in violation of Section 8(a)(3) of the Act.

5. Lewis J. Rogers

This employee was performing the job of loading trucks under supervisor Wingo immediately prior to the alleged discrimination in June. He had conversations with Wingo and Clowney in June, above described, in which Rogers told Clowney he was not sorry that he signed a union card. Rogers was directed by Wingo to work for Davis who assigned him to unload some watermelons. This job lasted for about 2 weeks, and he was then returned to his old job of loading trucks.

In my view, the evidence is insubstantial that Rogers' assignment to unloading watermelons was discriminatorily motivated. As previously pointed out, approximately 16 employees, including the employee who acted as Respondent's observer at the election, were reassigned from their regular jobs during this period to work temporarily unloading watermelons. Under these circumstances, and since Rogers was returned to his old job following the temporary assignment, I find a lack of substantial evidence that the assignment was discriminatorily motivated. Accordingly, I shall recommend that the complaint be dismissed insofar as it alleges discriminatory conduct by the Respondent towards Lewis Rogers.

II.

THE REPRESENTATION PROCEEDING
(Case 11-RC-4351)

Based upon all of the foregoing, I find that there is substantial evidence on the record that Respondent, by its supervisors and agents, engaged in wrongful and unlawful conduct during the period subsequent to the filing of the petition and prior to the election, and therefore conclude that the union's objections to the election be

sustained and that a new election be scheduled at a time found by the Regional Director to be appropriate.

III.

THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section I, above, occurring in connection with its interstate operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce in the free flow thereof.

Upon the basis of the foregoing findings of fact, and upon the entire record, I make the following:

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of the Act.

3. By coercively interrogating employees concerning their union activities; by threatening employees with reprisals if they selected the union as their collective-bargaining representative; by soliciting employees to withdraw from the union and revoke their membership cards, and promising them benefits in return therefor; and by creating an impression of surveillance of its employees' union activities, the Respondent has interfered with, restrained and coerced employees in the exercise of rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

4. By imposing more onerous and arduous duties upon its employees John Williams, Paul Johnson and James

McCollum, in order to discourage membership in the union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminated against its employee James McCollum, it is recommended that Respondent immediately restore this employee to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges.[28]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[29]

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[28]The foregoing affirmative directive is not applicable to the other discriminatees since Williams is no longer employed by the Company and Johnson was eventually restored to his former job of driving a forklift truck. No backpay is involved since the wage rate of the discriminatees was unaffected by the discriminatory transfers.

[29]In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondent, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 108, or any other labor organization, by assigning employees to more difficult and onerous jobs, or otherwise discriminating against employees because of their union membership or activities.

(b) Coercively interrogating employees concerning their union membership or activities.

(c) Threatening employees with reprisals should they join or assist the above-named union or select it as their collective-bargaining representative.

(d) Soliciting employees to withdraw from the above-named union, to revoke their membership cards, or promising them benefits in return therefor.

(e) Creating the impression of surveillance of its employees' union activities.

(f) In any like or related manner interfering with, restraining or coercing employees in the exercise of their right to self organization, to form, join, or assist the above-named labor organization, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Paul Johnson immediate and full reinstatement to his former job, or, if such job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(b) Post at its Spartanburg, South Carolina, warehouse, copies of the attached notice marked "APPENDIX."[30] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by the Company's authorized representative, shall be posted by it immediate upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the receipt of this decision, what steps has been taken to comply herewith.

IT IS FURTHER RECOMMENDED that the election in case 11-RC-4351 be set aside, and that a new election be scheduled at a time found by the said Regional Director to be appropriate.

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects.

Dated, Washington, DC May 19, 1978.

Robert Cohn
Administrative Law Judge

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[30] In the event no Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Cases 11–CA–7089
11–RC-4351

COMMUNITY CASH STORES, INC.

and

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL 108

ERRATUM

Through inadvertence, Paul Johnson's name appears in the first indented paragraph of the Notice To Employees instead of the name of James McCollum. Accordingly, the first indented paragraph on the Notice To Employees should read as follows:

> WE WILL offer James McCollum his former job, or if such job no longer exists, a substantially equivalent job and will restore his seniority and other rights and privileges.

Dated, Washington, D.C. May 31, 1978

Robert Cohn
Administrative Law Judge